IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1450

OTTO T. BANG, et al.,

Appellants,

vs.

ROGER F. NOREEN, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MOTION TO DISMISS OR AFFIRM

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
RICHARD A. LOCKRIDGE
Special Assistant
Attorney General
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2961

Of Counsel:
MARK M. SUBY
Special Assistant
Attorney General

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge federal district court for the District of Minnesota on the following grounds:

1. The decision of the district court is clearly correct under the principles recently enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *American Party of Texas v. White*, 415 U.S. 767 (1974).

2. There is no conflict of decision.

3. The question on which the decision of the cause rests is so insubstantial as not to need further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution and the relevant provisions of the Minnesota Ethics in Government Act, Minn. Stat. §§ 10A.30-10A.33 (1976) as amended, are reproduced in Appendix B to Appellants' Jurisdictional Statement.

QUESTION PRESENTED

Was the lower court correct in holding that the Minnesota law providing for partial public financing of certain political campaigns by means of a party-designated income tax return check-off system does not violate the appellants' rights guaranteed under the First and Fourteenth Amendments to the United States Constitution?

STATEMENT

The Minnesota public financing law, Minn. Stat. § 10A.30-33, as amended, Minn. Laws 1978, ch. 463, Jurisdictional Statement Appendix at A-31-A-53 (hereinafter "J.S. App. at ——"), provides for limited public subsidies for candidates running for state-wide office or for the legislature. The public financing system allows taxpayers and certain other groups of voting age persons to designate on their state income tax forms whether they wish to designate one dollar to the State Elections Campaign Fund and, if so, whether that dollar is to go to an earmarked party account or to the general account.

Funds in the particular party accounts are distributed by the state Treasurer to candidates of the respective parties[1] shortly after the primary elections in September of an election year. After the general election in November, the funds in the general account are distributed to all candidates who received at least 10 percent of the votes cast for the office for which they ran regardless of party affiliation or lack thereof.

Appellants are seven incumbent Independent-Republican (hereinafter "I-R") legislators who were candidates for re-election in 1976, one independent state senator running for re-election in 1976 and a private citizen. The law in effect at the time of the 1976 election provided that all members of the same political party running for the same office, *e.g.* state senate, received the same amount of public financing money.

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[1] Appellants observe that Minnesota is the only state to distribute public money directly to the candidates instead of to the political parties. Jurisdictional Statement at 19 n. 18 (hereinafter referred to as "J.S. at ——"). The Buckley Court, however, found that such a distinction between distribution systems was "immaterial." 424 U.S. at 95 n. 130.

Thus, in the 1976 elections, plaintiff Senate candidates Bang, Brataas and Kirchner each received about $1,429 in public funding while their opponents in the Democratic-Farmer-Labor party (hereinafter "DFL") received about $2,265. The plaintiff House candidates, Knickerbocker, Pleasant, Carlson and Laidig each received about $721 in public funding while their DFL opponents received about $1,138.[2] Plaintiff Berg was an independent candidate for the state Senate who declined to accept public financing. If he had accepted public financing and had received more than 10 percent of the votes cast for the office for which he ran, he would have received about $591 from the general account.

In the court below, plaintiffs sought a declaration that the party designated tax check-off was unconstitutional.[3] On October 12, 1976, the court issued an order, *inter alia*, denying plaintiffs' motion for a preliminary injunction restraining distribution of state monies to legislative candidates. On December 14, 1977, the court upheld the party designated tax check-off system. The court, however, ruled the legislative distribution system unconstitutional and ordered that unless a constitutional method for distribution of monies in the party accounts to legislative candidates was enacted by March 1, 1978, all monies credited to the party accounts for legislative accounts would revert to the state's general fund. The recent

[2] In the 1976 election, candidates for the state Senate could spend up to $15,000 for election while candidates for state Representative could spend $7,500. The amended law provides that only candidates receiving some form of public subsidy are bound by these expenditure limits. Minn. Laws 1978, ch. 463.

[3] Plaintiffs also challenged other provisions of Minnesota law which are not at issue here.

legislative amendments were enacted on February 27, 1978.[4]

Appellants have appealed from that part of the district court decision upholding the party designated check-off. Appellees filed a notice of cross-appeal on February 13, 1978, but will dismiss their cross-appeal since the 1978 legislative amendments have rendered the cross-appeal moot.

ARGUMENT

I. THE THREE-JUDGE FEDERAL DISTRICT COURT CLEARLY APPLIED THE PROPER STANDARD OF JUDICIAL SCRUTINY TO THE PROVISIONS OF THE MINNESOTA CAMPAIGN FUNDING LAW AUTHORIZING A PARTY-DESIGNATED TAX CHECK-OFF SYSTEM.

In validating the Minnesota party designated tax check-off mechanism, the three-judge federal district court properly concluded that the Act should not be reviewed under the standard of strict judicial scrutiny but that it must be sustained if it " 'bear[s] some rational relationship to [a] legitimate state purpos[e],' " citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973). J.S. App. at A-9. Relying on this Court's ruling in *Buckley v. Valeo*, 424 U.S.

[4] The district court had ruled the prior distribution system of funds to legislative candidates unconstitutional because "the aggregate political party preferences expressed by all the state taxpayers in Minnesota have no rational relation to the support for particular candidates within legislative districts." J.S. App. at A-19. The new law, Minn. Laws 1978, ch. 463, § 91, J.S. App. at A-41-43, promulgated pursuant to the court's order keys the amount of public financing received by a candidate from his party account to the political support a candidate's party enjoys within a particular legislative district. This new distribution system has not been passed upon by any court. The fundamental concept of the party designated tax check-off has not been altered by the 1978 legislation.

1 (1976), the lower court held that the Minnesota Act was constitutional if it "furthers 'sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate.' " J.S. App. at A-9. Application of this less exacting standard is appropriate since, as the court found, "the public financing provisions of the Act do not impinge upon the First Amendment rights of political candidates . . . ." J.S. App. at A-9.

Significantly, however, the test applied by the court was more exacting than traditional "minimum rationality." The court identified the "important" or "vital" governmental interests sought to be furthered by the Act, and decided that the means chosen to further these interests were within a range of choices reasonably calculated to advance these interests. *See* J.S. App. at A-9 through A-14.

Appellants contend that the Minnesota Act denies a candidate benefits because of his choice of political association and, hence, must be subjected to strict judicial scrutiny. J.S. at 11-12. In support of this position, appellants rely on the rulings enunciated by this Court in the "compelled disclosure" cases. *E.g., Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963). These cases subjected to strict judicial scrutiny state laws compelling organizations to release the names of their members to various public bodies. These cases were cited by this Court in *Buckley* in its analysis of the disclosure requirements of the Federal Act, 2 U.S.C. §§ 431, *et seq.*, which were held to be justified by sufficiently important governmental interests. *See Buckley v. Valeo, supra* at 64. The "compelled disclosure" cases formed no part of this Court's analysis of the Presidential Election Campaign Fund.

In its equal protection analysis of the federal campaign financing scheme in *Buckley*, however, this Court compared that scheme with the ballot-access regulations examined in prior cases. *See id.* at 93-96. This court noted that

> the denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'. [The Federal Campaign Financing Law] does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.
>
> * * *
>
> Accordingly, we conclude that public financing is generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases.

Id. at 94-95 (footnotes omitted). *Buckley* further observed that the federal public financing law "furthers, not abridges, pertinent First Amendment values." *Id.* at 93. Accordingly, this Court concluded that strict judicial scrutiny was not the appropriate standard by which to review the federal campaign financing law.

The Minnesota public financing system does not itself establish unequal public funding, but merely permits funding based upon expressed public support for particular parties. It does not enshrine any party into a "permanently preferred position." *Id.* at 94. It does not invidiously benefit incumbents as a class nor does it invidiously discriminate against any other class. There is nothing in the Minnesota act which in any way gives preferential treatment to any political party; the act is

politically blind. Indeed, the district court specifically noted that the plaintiffs had failed to demonstrate that the Minnesota Act would "unfairly or unnecessarily burden the political opportunity of minority party candidates." J.S. App. at A-12.[5]

Strict judicial scrutiny is therefore inappropriate and the court below properly applied the standard enunciated in *Buckley*. The appellees respectfully suggest that it is unnecessary for this Court to further refine the *Buckley* standard because it was clearly articulated and thoroughly discussed by the lower court.

II. MINNESOTA'S PARTY DESIGNATED TAX CHECK-OFF IS CONSTITUTIONAL UNDER *BUCKLEY v. VALEO* AND *AMERICAN PARTY OF TEXAS v. WHITE*.

The district court ruled the Minnesota party designated tax check-off system constitutional relying on *Buckley* and observing that "[i]t is clear that a party's or candidate's demonstrated public support may properly be considered in the distribution of public campaign funds." J.S. App. at A-13. The court further observed that the Minnesota system is preferable to other public financing systems since the taxpayer designation "minimizes state involvement in the distribution decision." J.S. App. at A-14. In *Buckley v. Valeo, supra*, and *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court has upheld the basic tenet of the Minnesota Act—that public financing may be based on demonstrated public support.

[5] In their Jurisdictional Statement appellants assert that

> It is clear from the record in this case that the inferior funding of I-R and independent candidates places them at a substantial disadvantage in their election contests. Testimony to that effect went unrebutted.

J.S. at 15.

This assertion, however, is contrary to the explicit finding of the district court quoted above. J.S. App. at A-12. Furthermore, there was no testimony in this case. Appellants are presumably referring to appellant Kirchner's deposition where he opined a disadvantage from the funding differences.

A. Language In Buckley Strongly Suggests That This Court Viewed The Designated Check-off As A Constitutional Means Of Public Financing.

In *Buckley*, the plaintiffs therein argued *inter alia*, that the federal check-off provision was invalid because it failed to do precisely what the Minnesota Act does, *i.e.* provide the voter with some choice as to which party or candidate shall receive his checked-off dollar. 424 U.S. at 91-92. *See also, Amicus Curiae* Brief of Senator Metcalf, *Buckley v. Valeo*. This Court upheld the federal check-off provision against this challenge but observed that:

> *Some proposals for public financing would give taxpayers the opportunity to designate the candidate or party to receive the dollar*, and § 6096 initially offered this choice. . . . The voucher system proposed by Senator Metcalf, as *amicus curiae* here, also allows taxpayers this option. But Congress *need not* provide a mechanism for allowing taxpayers to designate the means in which their particular tax dollars are spent. . . . Further, *insofar as these proposals are offered as less restrictive means*, Congress had legitimate reasons for rejecting both. The designation option was criticized on privacy grounds, 119 Cong.Rec. 22598, 22396 (1973), and also because the identity of all candidates would not be known by April 15, the filing day for annual individual and joint tax returns. . . .

424 U.S. at 92 n. 125 (emphasis added). Thus, while this Court ruled that the Congress "need not" allow for voter designation of a checked-off dollar, this Court clearly implied that such a system would be a constitutionally "less restrictive" mechanism.

The District of Columbia Circuit Court of Appeals in *Buckley*, 519 F.2d 821 (D.C. Cir. 1975) was even more explicit in stating that designated check-off plans are constitutional.

> *The objection [of the plaintiffs] seems to be that the voluntary checkoff is not sufficiently voluntary, that the taxpayer must have the freedom to designate which party or candidate will receive his checked-off dollar.*
>
> It is true that some plans for public financing, such as the "voucher" system suggested by Senator Metcalf . . . do allow the taxpayer this choice. *We assume that Congress might well have adopted that system, without constitutional objection, but we cannot say that the Constitution requires that the taxpayer have such an option.* If it is established that the Congress has power under article I, section 8, clause 1, to expend money to fund candidate campaigns, then surely Congress could do so simply by appropriating the sums to the Presidential Election Campagin Fund without giving individual taxpayers any control at all. *A fortiori Congress can establish a system which gives the taxpayer some choice*—in affecting the total amount of public funds to be distributed on the Congressional formula—without going all the way to permit each taxpayer complete authority over the disposition of his dollar of tax obligation. If the taxpayer wants to avoid any conception that some part of "his" tax money will benefit candidates he does not favor, then he can simply refrain from checking off his dollar for the Fund.

Id. at 880 (emphasis added).

B. In Upholding The Federal Act's Presidential Primary Matching System, Buckley Validated The Major Underpinning Of The Minnesota Designated Check-off.

The Presidential Primary Matching Payment Account under the Federal Act is intended to aid campaigns by presidential candidates in primary elections. 18 U.S.C. § 9031, *et seq*. The threshold eligibility requirement is that the candidate must raise at least $5,000 in each of 20 states.[6] Federal funding is then provided according to a matching formula whereby each qualifying candidate receives public funds equal to the total private contributions received disregarding contributions from any person to the extent they exceed $250. In sustaining the Presidential Primary Matching Payment Account, this Court in *Buckley* upheld the concept of appropriating funds to a candidate or party based on demonstrated public support. Thus, this Court upheld the basic principle underlying the Minnesota designated check-off.

Indeed, the thrust of the Minnesota check-off system is substantially fairer than the "matching" concept of the federal law. Under the federal law, a relatively small number of people contributing up to $250 each control the amount of matching funds which a candidate may receive.[7] This small group of people thus enjoys double influence since the candidate receives their contributions plus the matching funds based on those contributions. In contrast, the Minnesota system allocates funds based upon the one dollar designations made by hundreds of thousands of individual taxpayers and certain other voting age citizens.

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[6] Only the first $250 from each person contributing to the candidate may be counted.

[7] If as few as 20 people in each of 20 states contributed $250 to a particular candidate, they could qualify him for matching public funds. (20 x $250 = $5,000).

C. Other Cases Have Also Upheld The Principle Enunciated In Buckley Of Matching The Amount Of Public Financing To The Degree Of Public Support Enjoyed By A Party Or Candidate.

In *American Party of Texas v. White*, 415 U.S. 767 (1974), several minor parties sought positions for a slate of candidates on the general election ballot. Under Texas law, minor parties could achieve ballot positions only through party conventions or a petition process, while the major parties used the primary system. Texas provided for public financing from state revenues for primary elections only for those political parties receiving 200,000 or more votes for governor in the last preceding general election. The law precluded public funding to reimburse minor political parties for their costs in obtaining ballot positions. This Court upheld this method of public financing noting in part that the Texas system did not have "a real and appreciable impact on the exercise of the franchise." 415 U.S. at 794.

In *American Party of Idaho v. Andrus*, Civil No. 1-76-148 (D. Idaho 1976), *appeal dismissed* 430 U.S. 912 (1977), a three-judge federal panel upheld the Idaho public financing law. The Idaho law is analogous to the Minnesota Act in that it allows taxpayers to designate $1 on their state tax return to either a specific party or to an undesignated fund. Each party receives the funds in the earmarked account while payments from the undesignated fund are distributed to all parties in proportion to the share of votes cast for its gubernatorial candidate in the last election. *Idaho Code* § 63-3088 (1975).

In rejecting the American Party's contention that the mode of payment of the funds in the undesignated fund denied it

equal protection, the court stated that *Buckley* and *American Party of Texas v. White, supra*, were dispositive. On March 7, 1977, this Court dismissed the appeal "for want of jurisdiction." *American Party of Idaho v. Evans*, 430 U.S. 912 (1977).[8]

D. Through Credits And Deductions The State And Federal Tax Laws Provide A Method Of Public Financing Directly Analogous To The Minnesota Public Financing Law.

The Minnesota legislature and the United States Congress have both used their respective taxing powers for the partial underwriting of political parties and political candidates by providing for, in addition to the direct public financing tax check-offs, tax credits or deductions. *See* Minn. Stat. §§ 290.06 (11), 290.21 (1976); 26 U.S.C. §§ 41(b), 218(b). When an individual who has contributed to a political campaign or candidate receives a credit or deduction that reduces his income tax liability, the Government in effect makes part of the contribution through its loss of tax revenue. These tax incentives "permit the realities of the campaign . . . to be reflected through the separate decisions of millions of taxpayers. . . ." Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. of Legis. 359, 418 (1972). The district court properly observed that such tax credits and tax deductions are "directly analogous" to Minnesota's party-designated tax check-off. J.S. App. at 14.

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[8] The issue of keying the distribution of public funds to candidates or parties based on demonstrated public support was presented to the Court in that case. Motion to Dismiss Or Affirm at 17-21, American Party of Idaho v. Evans, 430 U.S. 912 (1977).

It is, of course, highly improbable that this loss of state tax revenue would be distributed equally between the I-R and DFL. *See* district court opinion, J.S. App. at A-14. Indeed, it is likely that to the extent the deductions are most beneficial to higher income persons or that tax credits may be used by those most able to afford political contributions, one party might receive considerably more benefit than the other from these tax incentives. Nevertheless, this disparity in no way operates to invalidate these tax provisions. This use of the taxing power is generally recognized not to "give rise to serious constitutional difficulties." 9 Harv. J. of Legis., *supra* at 411.

E. Appellants' Constitutional Arguments Are Specious.

Rather than confronting the *Buckley* rationale, appellants assert that the Minnesota Act affects their "right of political association" and "right to vote" because, in the 1976 election, each DFL candidate received several hundred dollars more from the DFL party account than each I-R candidate received from the I-R party account. J.S at 10-16.

The Supreme Court has never held that all individuals or groups must be treated precisely the same. *See Jenness v. Fortson*, 403 U.S. 431 (1971); *Norvell v. Illinois*, 373 U.S. 420 (1963). As the *Jenness* court noted, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . ." 403 U.S. at 442.

If the appellants' suggested alternative of precisely equal public funding to all major party candidates regardless of popular support (J.S. at 24) were effectuated, it would be necessary to bar voters from registering their choices through a designated check-off. Under such a system, it would be the government rather than the citizen that would determine the

amount of money each candidate would receive. Obviously, the rights of individual voters are impinged upon less by having the citizenry determine, to the extent feasible, the amount which each party or candidate will receive. *See* district court opinion, J.S. App. at A-16-A-17 & n. 29. Furthermore, such a system might operate to unfairly subsidize a party which does not enjoy equal strength with another party and force voters in a majority party to subsidize a non-majority party. Although this alternative may be constitutionally adequate, as may other means of public financing, it is certainly not a less restrictive alternative.

Appellants' analogy to the ballot access cases (J.S. at 13-16) is also misplaced for two reasons. First, the Minnesota Act does not impede access to the ballot; indeed, as the *Buckley* Court found, public financing furthers First Amendment rights. *Buckley v. Valeo*, *supra* at 93. Second, contrary to appellants' assertion that "[f]actual proof of discriminatory effect upon major-party candidates is present here," J.S. at 18, the district court expressly found that plaintiffs had not adequately

> demonstrated that the Act's public financing provisions will unfairly or unnecessarily burden the political opportunity of minority party candidates. The mere fact that, in a given year, IR candidates received less public money from their party account than did DFL candidates provides no basis for predicting that the Act will invariably and invideously benefit the majority party.

J.S. App. at A-12.[9] Significantly, notwithstanding appellants' professed fears of a "substantial disadvantage in their elec-

[9] *See* n. 5 *supra*.

tion contests . . ." (J.S. at 15), all seven I-R appellants in the instant case were re-elected in the 1976 elections. 1977-78 Minnesota Legislative Manual, pp. 63-5.

III. APPELLANTS' CONTENTIONS CONCERNING INDEPENDENTS AND USE OF THE INCOME TAX SYSTEM ARE MERITLESS.

Appellant Berg's contentions concerning independents are without merit. First, Berg, like Eugene McCarthy in *Buckley*, chose not to accept public financing. Thus, he does not present a justiciable case or controversy. 424 U.S. at 87 n. 118. Second, the Minnesota law allows independents to receive substantial public funding if they receive more than 10 percent of the vote in the general election for the office for which they are running. Minn. Stat. § 10A.31, subd. 7. Appellants apparently contend that Berg, as an independent, should receive precisely as much money as candidates who are affiliated with the I-R or DFL parties. Such a system, however, would be unfair to major party candidates since they must run in primary elections as well as general elections. As an independent, Berg was not required to run in the primary elections and did not even have his name on the primary ballot. Indeed, the *Buckley* decision speaks only of "general election funding." 424 U.S. at 87 n. 118.

The Supreme Court in *Buckley* emphasized that "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes." 424 U.S. at 97. Minnesota's provision relating to independents is eminently fair. It grants serious independents significant public financing but makes reasonable distinctions between candidates who must run in both the primary and general elections and those who need run only in the general election.

Appellants also allege that Minnesota's use of the tax system is improper since it does not precisely mirror the electorate. Although this system was upheld by the lower court, the 1978 session of the legislature amended this section of the law to further broaden the persons entitled to designate one dollar to the State Elections Campaign Fund. Under the new law, in addition to taxpayers, persons who file renter or homeowner property tax refund requests or an adult dependent of such a filer or of a taxpayer may also designate one dollar to the State Elections Campaign Fund. Minn. Laws 1978 ch. 463, §§ 87-88. J.S. App. at A-39. Appellants' assertion that this amended law "persists in denying participation to all eligible voters and continues to permit non-voter taxpayers to participate," J.S. at 15, is meaningless since this new provision has not been challenged or passed upon by the district court. In any event, the prior provision, which was upheld by the district court herein, was the same as the federal check-off system which was implicitly validated in *Buckley*. 424 U.S. at 85-108.

CONCLUSION

The district court properly applied the principles enunciated in decisions of this Court. Since the district court opinion is not in conflict with decisions of this Court or of any other court, the appeal herein should be dismissed or the decision of the district court should be summarily affirmed.

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
RICHARD A. LOCKRIDGE
Special Assistant
Attorney General
515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2961

Of Counsel:
MARK M. SUBY
Special Assistant
Attorney General